



Date: JULY 16, 1998

Case No. 97-INA-554

In the Matter of:

KINDERCARE LEARNING CENTER, INC.

Employer,

on behalf of:

LETITIA M. FRANKS

Alien.

Appearance: J. Bradley Ortins, Esq.

Before: Lawson, Neusner and Vittone
Administrative Law Judges

JAMES W. LAWSON
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of the alien by the employer under §212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. §1182(a)(5)(A) (the Act) and the regulations promulgated thereunder, 20 CFR Part 656.¹ After the Certifying Officer (CO) of the U.S. Department of Labor (DOL) denied the application, the Employer requested review pursuant to 20 CFR § 656.26.²

Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (1) there are

¹The following decision is based on the record upon which the CO denied certification, including the Notice of Findings (NOF), rebuttal and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

²Administrative notice is taken of the Dictionary of Occupational Titles, (DOT) published by the Employment and Training Administration of the U. S. Department of Labor.

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not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U. S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

THE PROCEEDINGS

Employer seeks to fill the position of Preschool Teacher with DOT Title Nursery School Attendant, DOT #359.677-018, a wage offer of \$7.75 per hour, job duties of:

Work with children at child development center. Instruct and interact with children, plan and carry out activities, provide care as required (comfort & clean & change diapers).
Work with 2 year olds. (AF 134)

and job requirements of two years' experience in the job offered or two years of experience as an elementary school teacher.

Other special requirements included:

1. must be qualified in infant & child CPR;
2. eligible to meet Maryland state requirements for senior staff in preschool centers.
3. must have work experience with children 2-4 years old.

(AF 134)

The application was denied by the CO on the basis that the requirement of two years' experience in the job offered or two years' experience as an elementary school teacher was found to be unduly restrictive. (AF 16-19) Based on the wage offer, job description, and educational requirements, the position was reclassified by the CO as a "Nursery School Attendant" which is listed in the Dictionary of Occupational Titles (DOT) as not requiring two years of experience. (AF15-17) The CO found that such a position required less than one year of experience in the job offered and that the employer had unsuccessfully rebutted such restrictive experience requirements and had failed to document the business necessity for requiring such.

CONTENTIONS ON APPEAL

On appeal, employer seeks review of the contentions, among others, that employer has proven the business necessity for requiring two years' experience, different from the normal occupation which the CO found to be unduly restrictive. In addition, employer addresses the inconsistency of the CO's labor certification determinations, arguing an abuse of discretion by the CO. As grounds for such accusation, employer asserts that a few months prior to the CO's denial in the present case, the same alien had been granted labor certification in a "nearly identical application (i.e., same alien, same duties, different employer)". Employer goes further to state that although labor certifications are determined on a case-by-case basis, it would be "manifestly unjust to uphold the CO's unreasonable change of position" given the identical nature of this case. Therefore, employer requests that the CO's decision in this matter either be reversed or remanded for a full review of the evidence submitted.

DISCUSSION

Reversal is warranted. Denial of certification was based upon recoding of the position from 092.227-018 TEACHER, PRESCHOOL³ to 359.677-018 NURSERY SCHOOL ATTENDANT⁴ and that the position, as re-coded, had unduly restrictive job requirements, which

³ 092.227-018 TEACHER, PRESCHOOL (education)

Instructs children in activities designed to promote social, physical, and intellectual growth needed for primary school in preschool, day care center, or other child development facility. Plans individual and group activities to stimulate growth in language, social, and motor skills, such as learning to listen to instructions, playing with others, and using play equipment. May be required to have certification from state. May be designated Teacher, Child Development Center (education); Teacher, Day Care Center (education); Teacher, Early Childhood Development (education); Teacher, Nursery School (education). GOE: 10.02.03 STRENGTH: L GED: R4 M2 L3 SVP: 7 DLU: 81

⁴ 359.677-018 NURSERY SCHOOL ATTENDANT (any industry) alternate titles: child-care leader; child-day-care center worker; day care worker

Organizes and leads activities of prekindergarten children in nursery schools or in playrooms operated for patrons of theaters, department stores, hotels, and similar organizations: Helps children remove outer garments. Organizes and participates in games, reads to children, and teaches them simple painting, drawing, handwork, songs, and similar activities. Directs children in eating, resting, and toileting. Helps children develop habits of caring for own clothing and picking up and putting away toys and books. Maintains discipline. May serve meals and refreshments to children and regulate rest periods. May assist in preparing food and cleaning quarters. GOE: 10.03.03 STRENGTH: L GED: R3 M2 L3 SVP: 4 DLU: 81 092.227-018 TEACHER, PRESCHOOL (education)

were not rebutted, although rebuttal as to the rejection of U.S. workers was accepted. The justification for recoding was predicated upon the following statement in the FD:

As can be seen, the two positions are similar, however, as stated above, the Teacher, Preschool, position generally requires a college degree in preschool or elementary education. Your position, based on the job duties listed, involve the comforting, cleaning and changing of diapers of 2 year olds. In addition the prevailing wage for a Teacher, Preschool, in your geographic area is \$12.91 per hour, further supporting the fact that this position is a Nursery School Attendant. (AF 16)

The record does not support the CO's rationale. In the first place there is no citation to any authority for the FD statement that "the Teacher, Preschool, position generally requires a college degree in preschool or elementary education." The record does not disclose the basis for this statement, nor do we find any. The *Code of Maryland Regulations* governing Child Care Licensing 07.04.02.25 **Requirements for Senior Staff in Preschool Centers** has no such requirement, although it has other definitive requirements (AF 36) which the alien meets, unlike the sole U.S. applicant concerning whom rebuttal was accepted. (AF 19) The DOT position description neither requires nor mentions such educational requirement. Nor does the *Occupational Outlook Handbook, 1990-91 Edition*, which under the section Summary Data for Occupations Not Studied in Detail describes the position only as:

Teachers, preschool

Teach preschool pupils basic physical, mental, and developmental skills in public or private schools. (p. 452)

On the other hand, the *Handbook* states with respect to Kindergarten and Elementary School Teachers:

Requirements for regular certification vary by State. Generally, however, they include a bachelor's degree from a 4-year program and completion of an approved teacher education program.

Instructs children in activities designed to promote social, physical, and intellectual growth needed for primary school in preschool, day care center, or other child development facility. Plans individual and group activities to stimulate growth in language, social, and motor skills, such as learning to listen to instructions, playing with others, and using play equipment. May be required to have certification from state. May be designated Teacher, Child Development Center (education); Teacher, Day Care Center (education); Teacher, Early Childhood Development (education); Teacher, Nursery School (education).
GOE: 10.02.03 STRENGTH: L GED: R4 M2 L3 SVP: 7 DLU: 81

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The CO's statement in the FD regarding the educational requirement appears to be pure speculation.

In the second place, the FD focuses on only one aspect of the position offered in stating:

Your position, based on the job duties listed, involve the comforting, cleaning and changing of diapers of 2 year olds (AF 16)

The FD omits any discussion of the position function to "Instruct and interact with children, plan and carry out activities..." Also, the FD fails to acknowledge that 2 year olds, whether in the hands of a preschool teacher or a nursery school attendant, would by the very fact of their age and development require comforting, cleaning and changing of diapers. Beyond that, however, the teacher does more.

In the third place, the FD supported its re-coding on the basis that employer's wage offer of \$7.75 per hour approximated that of a Nursery School attendant of \$7.56 per hour (AF 15) compared to the prevailing wage of \$12.91 per hour for Preschool Teacher (AF 16) assertedly determined under the McNamara-O'Hara Service Contract Act for the geographic area involved. However, neither the NOF nor the FD directly addressed the evidence of the employer detailing a prevailing wage of \$6.92 based on a survey of 6 daycare centers having a range of \$6.00 to \$8.00 for "starting wage offered to senior staff with 2 years experience". (AF 73) The CO did not attempt to defend the Maryland Department of Labor Wage Survey determination of \$10.27 where there was an unexplained great disparity ranging from \$6.00 to \$15.00 (AF 80) that was thoroughly discredited by presentations of the employer and its attorney (AF 94-100) which also included a Maryland Child Demographics Report⁵ for Howard County (where employer is located) showing Annual Wage Rate Information for Center Senior Staff/Teacher (Maryland) of \$14,831 which translates into an hourly rate of \$7.13. Instead the CO's prevailing wage level of \$12.91 was first asserted in the FD without any supporting details, and opportunity for the employer to respond or readvertise which would be necessary for a direct attack on the employer's wage level. The CO cannot be allowed to do indirectly what could not be done directly. See *Tyson's Corner Play & Learn Center*, 94-INA-26 (July 19, 1995) (details necessary to support survey of CO vis-a-vis employer); *Shaw's Crab House*, 87-INA-714 (Sept. 30, 1988); *Jose Eber*, 88-INA-100 (Oct. 3, 1989); *Tarmac Roadstone*, 87-INA-701 (Jan. 4, 1989) (issues that were not raised in the NOF); and *O'Neal Eng'g, Inc.* 94-INA-567 (Feb 26, 1997) (significance of potentially disparate levels of skills and experience).

⁵The Maryland Committee for Children, Inc. (MCC), as operator of the Statewide Child Care Resource Center of the Maryland Child Care Resource Network, has prepared the Maryland Child Care Demographics Report series to assist those interested in identifying child care trends across the state. The Series includes reports for the State of Maryland and for each of the state's jurisdictions (23 counties and the City of Baltimore).

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Under the circumstances, the recoding cannot stand and the application warrants certification as filed without need to review the contentions concerning business necessity of the job requirements for the recoded position.

Accordingly, the following order will enter.

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ORDER

The Certifying Officer's denial of labor certification is hereby **REVERSED** and the alien is herewith ordered **CERTIFIED**.

For the Panel:

JAMES W. LAWSON
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW
Suite 400
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.

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